Metropolitan Regional Council of Carpenters, Southeastern Pennsylvania, State of Delaware and Eastern Shore of Maryland a/w United Brotherhood of Carpenters *and* Allied Maintenance Technologies. Case 4–CB–9267

September 27, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On May 25, 2005, Administrative Law Judge Jane Vandeventer issued the attached bench decision.* The Respondent filed exceptions and a supporting brief, the Charging Party filed an answering brief, and the Respondent filed a reply brief.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. September 27, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Bruce G. Conley, Esq., for the General Counsel.
Stephen J. Holroyd, Esq., for the Respondent.
Thomas A. Beckley, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

JANE VANDEVENTER, Administrative Law Judge. This case was tried on May 24 and 25, 2005, in Philadelphia, Pennsylvania. After hearing oral arguments by counsel, I issued a Bench Decision on May 25, 2005, pursuant to Section 102.35(1) (10) of the National Labor Relations Board's Rules and Regulations setting forth findings of fact and conclusions of law.

I certify the accuracy of the portion of the transcript, as corrected,[2] pages 187 to 200, containing my Bench Decision, and I attach a copy of that portion of the transcript, as corrected, as Appendix A.

If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order[3] shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Dated at Washington, D.C., June 24, 2005.

APPENDIX A

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BENCH DECISION

This case was tried on May 24th and 25th, 2005, in

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Philadelphia, Pennsylvania. The complaint alleges Respondent violated Section 8(b)(3) of the Act by failing and refusing to bargain in good faith with the Charging Party. Respondent filed an answer denying the essential allegations in the complaint. After the conclusion of the evidence, the parties made oral arguments which I have considered.

Based on the testimony of the witnesses, including particularly my observation of their demeanor while testifying, the documentary evidence and the entire record, I make the following findings of fact.

I. Jurisdiction. The Charging Party, the employer, is a Pennsylvania corporation with an office and place of business in Bethlehem, Pennsylvania, where it is engaged in the construc-

* Page 189 of that bench decision, line 6 is corrected to reflect that the collective-bargaining contract between the Respondent and the Lehigh Valley Contractors Association took effect on July 1, 2004, not July 1, 2005.

[1] In adopting the judge's dismissal of the complaint, we clarify her statement (sec. II.B.) that the Board in *Teamsters Local 282 (Clemente Contracting)*, 335 NLRB 1253 (2001), held that the union respondent there did not violate Sec. 8(b)(3) "by insisting on contract proposals which were consistent with those in its agreement with an area association of employers." To be precise, the union's conduct at issue in that case did not involve bargaining table conduct, rather a strike to obtain from the employer the substantive terms contained in a contract between the union respondent and a multiemployer association.

We also note that the quotations in the first paragraph of sec. II.B. of the judge's decision are from *Kankakee-Iroquois County Employers' Assn. v. NLRB*, 825 F.2d 1091, 1094 (7th Cir. 1987), not the underlying Board decision in that case.

[2] I have corrected the transcript containing my Bench Decision, and the corrections are reflected in the attached Appendix B.

[3] If this Order is enforced by a judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

tion industry in the provision of drywall installation, construction, renovation and demolition services. During a representative one-year period, the Employer has purchased and received at its Bethlehem facility goods valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania. Accordingly, I find, as respondent admits, that the Charging Party is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

The Respondent, (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. Unfair Labor Practices.

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A. The Facts.

1. Background. Respondent has for many years had successive collective bargaining agreements with an association of construction industry employers called the Lehigh Valley Contractors Association (LVCA). The current collective bargaining agreement is effective by its terms from July 1, 2005 through June 30, 2008. Agreement on the current contract between Respondent and the LVCA was reached on about June 8, 2004. The previous collective bargaining agreement had been effective for the three years ending on June 30, 2004.

Respondent represents the carpenter employees of the Charging Party. The Employer signed a memorandum agreement, also known as a me-too agreement on June 7, 1999, which bound the Employer to the then current agreement between the Respondent and the LVCA. This agreement was renewed, that is, the agreement between the Employer and the Respondent, was renewed under a renewal clause in the memorandum agreement. The Employer was thereafter bound to the 2001 to 2004 LVCA agreement.

On March 25, 2004, the Employer gave notice to the union that it was not going to renew its memorandum agreement and desired to bargain separately with the Respondent. It is undisputed that the Respondent both accepted the Employer's notice and gave effect to it and, thereafter, pursued negotiations with the Employer on an individual Employer basis.

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The Union subsequently filed a representation petition and won a representation election among the Employer's carpenter employees and was certified on June 16, 2004 as the exclusive collective bargaining representative of the employees.

2. Credibility. Most of the facts herein are undisputed, but there are a few differences in the testimony of the two witnesses, Michael Galio, business representative for the Respondent and Jeff Smith, vice president for the Employer. Galio displayed the better and more detailed recollection overall, but exhibited one major lapse of memory related to the first proposal of the Employer, General Counsel's Exhibit 10. As to that document and the discussions surrounding it, I have credited Jeff Smith. While Jeff Smith demonstrated a poor memory overall, his recollection, assisted by the refreshment provided by the documents, was adequate on this issue.

As to numerous other meetings and phone calls between the two witnesses, as well as the date of the one-day strike which occurred, I have credited the testimony of Galio. As to the meetings and phone calls, Mr. Jeff Smith did not recall some of those.

3. Negotiations between the Respondent and the Charging Party. In early June, the Union concluded an agreement with the 23 LVCA for an extension of their collective bargaining agreement. The new agreement would be effective beginning July 1st, 2004 and through four years thereafter. There were certain changes to the

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previous agreement and one year of wages and benefits was agreed to.

The day after Respondent was certified as a representative of the Employer's employees, Mr. Galio presented the same terms which had been agreed between Respondent and the LVCA to the Employer's vice president, Jeff Smith. Jeff Smith had never bargained before and did not understand the form of the Union's proposal, which was a summary of the changes to the previous agreement. But Jeff Smith did not tell Mr. Galio that he did not understand the form of the proposal.

The collective bargaining agreement between the Respondent and the Employer was due to expire on June 30th, but the Employer neither requested an explanation of the Union's proposal, nor any meeting. Instead, Jeff Smith prepared to go on a nearly two week vacation beginning July 1st. Jeff Smith did not agree to Respondent's proposal, nor did he tell Galio he didn't understand the format of the proposal, he just said he needed more time.

Finally, Jeff Smith was prodded into another meeting with Galio on June 30th. Then, on July 1st, he finally requested the Respondent to merge the changes outlined in its proposal with the LVCA agreement, thereby creating a full proposal which Jeff Smith wished to have for his understanding of the proposal.

Thereafter, the Respondent complied with this request and, basically, merged the changes into the complete collective

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bargaining agreement language and supplied this full outwritten collective bargaining agreement proposal to the Employer before July 13th, when Jeff Smith returned from his vacation.

Pressed again by Michael Galio for a response on July 14th, Jeff Smith again requested and got more time in which to consult his attorney. Finally, six weeks after first receiving the union's proposal, Jeff Smith gave a response which was embodied in General Counsel Exhibit 10, wherein he accepted wages and benefits as proposed by the Union, but proposed numerous changes in non-economic terms and conditions of employment.

I credit Michael Galio to the effect that he visited the Employer's Snowdrift Road job site on August 4th, in order to meet with employees, as Jeff Smith was also meeting with them at that location. However, I further credit Michael Galio to the effect that the employees did not strike on August 4th, but did strike later on, on September 8th. However, I credit Jeff Smith's testimony regarding the 1:00 p.m. meeting on August 4 at the Depot Restaurant between Michael Galio and Jeff Smith. At that meeting, Jeff Smith changed his position on many issues and agreed to some of the Union's proposals. Those

changes were later embodied in the Employer's second and last proposal, which is GC Exhibit 11.

Michael Galio, for the Union, stated that he'd consider

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certain of the changes proposed by the Employer, although he did not at that meeting agree to any. As testified to by Jeff Smith, Michael Galio said, "We'll see" in response to several Employer-proposed changes. I find that this response indicated a willingness to consider the Employer's proposals in those areas. At the close of this meeting, Jeff Smith told Michael-Galio he would prepare a new draft of the Employer's proposals underlining the changes.

Whether the underlining was to be those things which varied from the Employer's first proposal to the second proposal, or whether the underlining was to be under words that evidenced differences between the Union's proposal and the Employer's proposal was not made clear. What is clear is that Michael Galio and Jeff Smith had different ideas of what was to be underlined.

Michael Galio called, met with and attempted to meet with Jeff Smith several times between August 4th and the end of August and agreed to several pleas by Jeff Smith for more time, this time because the Employer's attorney was on vacation.

Finally, in late August, the Employer forwarded a second proposal, GC Ex. 11, to the Union. Michael Galio, after after reviewing part of it, was angry because the changes from the first Employer's proposal were not underlined as he had expected to see. Frustrated by this deficiency, as well as by the repeated delays and apparent reluctance to meet

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on the part of the Employer, Michael Galio lost patience and told Jeff Smith that if the parties were going to spend a lot of time bargaining line-by-line, they were not going to do it while the men were working. He told Jeff Smith he was going to call a strike and he did so on September 8th. On September 9th, the Employer agreed to the Union's proposal, signed the memorandum agreement and the employees returned to work.

B. Discussion and Analysis.

In a quite recent case, Teamsters Local 282 (E.G. Clemente-Contracting), 335 NLRB 1253 (2001), the Board found that a union had not violated its duty to bargain by insisting on contract proposals which were consistent with those in its agreement with an area association of employers. In addition, the Union's conduct in striking in order to put pressure on the Employer to agree to those proposals likewise was not a violation. In that case, the Board referred extensively to another similar case, Teamsters Local 75 (Kankakee-Iroquois), 274 NLRB 1176 (1985), which was upheld by the Seventh Circuit Court of Appeals. The decision of the Circuit Court in Kankakee-Iroquois pointed out that a party's refusal to recede from an announced position is not equivalent to a refusal to bargain. In the underlying case, the Board pointed out that Section 8(d) of the Act, in defining the duty to bargain, states that the obligation "does not compel either party to agree to a proposal or require the making of a concession." The Board observed further that a

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party "is entitled to stand firm on a position if he reasonably believes that it is fair and proper, or, that he has sufficient bargaining strength to force agreement by the other party," citing NLRB v. Advanced Business Forms Corp., 474 F.2d 457, 467 (2nd Circuit 1973).

The Act "does not preclude a union from bargaining aggressively with an individual employer over the terms of a Union contract even where the contract the Union is bargaining for is substantially similar to the contract the Union previously negotiated with a multi-employer unit." A case supporting that position is Florida Power & Light v. Electrical Workers, Local 641, 417 U.S. 790, 803 (1974). That principle is also supported by the Pennington case from the Supreme Court, which was quoted by Respondent's counsel in his argument yesterday.

Regarding the facts in this case, I find that the record evidence shows that the Union never threatened to and never did refuse to bargain with the Employer. Respondent Union threatened to strike and did strike for one day. In other words, the Union said it would use the tools of economic pressure which were legally available to it in order to bolster its bargaining position.

I specifically credit Michael Galio's testimony as to his statement to the effect that, if we're going to bargain line-by-line, we're going to do it during a strike, or, words to that

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effect. After repeated delays by the Employer and several short meetings with Jeff Smith, an entirely inexperienced bargainer, the Union took the position that it would certainly keep on bargaining, line-by-line, if that was what the Employer insisted on, but that the bargaining would take place during a strike.

As Teamsters Local 272, the Clemente case, clearly holds, this is entirely lawful. Under the General Counsel's theory, the Charging Party here would be able to have its cake and eat it, too. It could insulate itself against the lawful strike weapon, while enjoying the benefits of a Union contract and, avoiding any part of the contract it did not like.

This scenario is not what our system of collective bargaining envisions. The Employer has tools of economic pressure of its own. The Employer may, after a genuine impasse, implement its own terms and conditions of employment as set forth in its latest proposal. The Employer may, in response to a strike, hire replacement employees. The Employer may even, in some circumstances, lock out its employees.

Here, the Employer availed itself of none of the tools of economic pressure available to it. Instead, by its conduct, it clearly showed that the lawful strike tool of the Union was sufficient pressure to induce the Employer to abandon its own few and relatively minor proposed changes to the Union's proposal and, instead, to agree in total to the Union's proposal.

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The precedent cited by General Counsel in support of its complaint is not persuasive. Some of the cases are inapposite because the essence of the violations in those cases, the Graphic Arts case, which is cited in the complaint herein and other cases cited by the General Counsel, the essence of the 8(b)(3) viola-

tions in many of those cases was that the Union would not give effect to the Employer's withdrawal from a multi-employer association or collective bargaining agreement, and the 8(b)(3) was premised on that alone.

In this case, we have no such facts and no such issue. Some of the other precedent cited by General Counsel are two more than 20 year old cases in which 8(b)(3) violations were found. The first one is Teamsters Local 418, a 1981 case, the cite of which was in General Counsel's argument on the record yesterday. First of all, that case is old. Secondly, the facts are quite different from this one. In fact, the case distinguished by the Administrative Law Judge in his analysis is far more similar to the case we have before us. And, in the case that the ALJ distinguished, there was no 8(b)(3) violation found. In the second case, also more than 20 years old, cited by General Counsel containing an 8(b)(3) violation, Food City West Commercial Workers Local 1439, that case was specifically overruled as to the 8(b)(1)(b) aspect which definitely lent weight to the 8(b)(3) violation found. Take away the 8(b)(1)(b)

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in that case and, I believe that the remaining portion of that case is at least implicitly overruled by the Teamsters 282 case, the Clemente case.

I find Food City West, as well as the Teamsters Local 418 case quite unpersuasive and clearly distinguishable from a case like this, which is very similar to Teamsters 282 (Clemente) and some how bring it into the violation category.

The General Counsel's case is premised on the supposed 10 take-it or leave-it proposals of the Union. The General Counsel appears to argue that merely by saying the words, "totality of the circumstances," it can overcome the completely opposite precedent embodied in Teamsters Local 282.

As I have found, the "totality of the circumstances" includes much more than the Union's proposal, which certainly did not change appreciably. The totality of the circumstances includes all the conduct, including the Employer's conduct, including the economic power of the parties and their use of the totality of the circumstances includes some of the facts cited by Respondent's counsel in his excellent argument yesterday, such as the Union's conduct in seeking meetings, extending deadlines, delaying a strike action and its rationale advanced in support of its proposals, area standards and the other rationales that Mr. Galio testified to.

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The General Counsel stresses the give and take of bargaining. The give and take of bargaining is a good phrase, but it is most applicable when the parties have equal economic strength. In this case, the Union's exercise of its tool of economic pressure, the strike, was sufficient to change the Employer's mind and, in the words of the case law, I believe, Advanced Business Forms, if the party wishes to stand firm on its position, he's entitled to do so, if he believes he has sufficient economic strength to force agreement by the other party. That's obviously what happened in this case.

The General Counsel's theory focuses only on the take-it or leave-it position, the consistent position which the Union adhered to, totally ignoring the evidence that the Union had every intent to continue bargaining with theEmployer during a strike, if necessary. The General Counsel appears to equate the Union's intention of calling a strike with an intention to cease bargaining in good faith. No such equation is possible, nor is it supported by the facts of this case, nor by legal precedent.

The General Counsel's theory is fatally flawed and is unsupported by the record evidence. Respondent's argument to the effect that take-it or leave-it bargaining is most often cited as only one factor in an analysis of the totality of the circumstances and normally where it is being used as a tactic

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to avoid agreement, rather than to gain agreement, as occurred here, is also a persuasive one.

As stated above, Respondent did not have to reach the issue of whether or not to modify its proposals further than by casting the agreement in the individual employer form, naming the Employer specifically, because when it used the tool of economic pressure which was at its disposal, the strike, the Employer agreed to its proposals.

I find that the Employer agreed, not because of any unlawful conduct by respondent, but because the lawful economic pressure of the strike was effective in inducing a change of position.

Therefore, based on this analysis and all the record evidence, I find that the General Counsel has not proved a violation of Section 8(b)(3) of the Act. I shall recommend that the complaint be dismissed.